

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JULY 5, 00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Land & Sea Imports, Inc.

Serial No. 75/174,016

Aaron B. Retzer of Epstein Edell & Retzer for Land & Sea
Imports, Inc.

Lori M. Stockton, Trademark Examining Attorney, Law Office 113
(Meryl Hershkowitz, Managing Attorney).

Before Hohein, Bucher and Bottorff, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant, a New York corporation, seeks registration of
the mark "LAND & SEA" for goods identified in the application as
"boat and wildlife figurines, and wall plaques, all made of wood
and resin," in International Class 20.¹

The Trademark Examining Attorney has refused registration
under Trademark Act Section 2(d), 15 U.S.C. §1052(d), citing a

¹ Serial No. 75/174,016, filed September 30, 1996. The application
is based on use in commerce under Trademark Act Section 1(a), 15
U.S.C. §1051(a), with January 1992 alleged as the date of first use of
the mark anywhere and January 1992 alleged as the date of first use of
the mark in commerce.

registration for the mark "LAND & SEAS" for services identified as "retail store services in the field of gift items," in International Class 42,² as a bar to registration of applicant's mark. The refusal to register was made final on the ground that applicant's mark, when applied to its goods, so resembles the registered mark as to be likely to cause confusion, to cause mistake, or to deceive.

Applicant has appealed the final refusal to register. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

In the course of rendering this decision, we have followed the guidance of *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). This case sets forth the factors which, if relevant, should be considered in determining likelihood of confusion. In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship between the goods and services. See *Federated Food, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Under the first *du Pont* factor, we examine the similarities or differences in sound, appearance, meaning and overall

² Reg. No. 1,906,088 issued on July 18, 1995 to Land and Seas, Inc., a Michigan corporation, maturing from application Ser. No. 74/432,450, filed on September 7, 1993. The registration sets forth dates of first use in 1982.

commercial impression of the two marks. There is no question that applicant's mark, "LAND & SEA," is very similar in appearance and sound to registrant's mark, "LAND & SEAS." As the Trademark Examining Attorney points out, with the difference of a single, terminal letter, it is unlikely that consumers would be able to distinguish the proposed mark ("LAND & SEA" - without an "S" to pluralize the word "SEA") from the registered mark ("LAND & SEAS"). The pluralization in registrant's mark is of little significance in determining the degree of confusing similarity of two marks. See *In re Pix of America, Inc.*, 225 USPQ 691 (TTAB 1985) [likelihood of confusion between "NEWPORTS" for shoes and "NEWPORT" for outer shirts]. To the extent that there is any difference in meaning when these nearly identical marks are applied to the respective goods and services, we find that the difference is subtle and would be, for the most part, lost on the consuming public.

We turn next to a consideration of whether there is a commercial relationship between the goods identified in applicant's application, i.e., "boat and wildlife figurines, and wall plaques, all made of wood and resin," and the services recited in the cited registration, i.e., "retail store services in the field of gift items."

As has often been stated, it is not necessary that applicant's goods and registrant's services be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods and services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association or connection between the producers of the respective goods and services. See In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978). Moreover, because applicant's mark is substantially identical to the registered mark, there need be only a viable relationship between applicant's goods and registrant's services in order to warrant a finding of likelihood of confusion. See In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993) [the distributorship of automotive parts related to oil change and lubrication services]; In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983) [e.g., the use of similar marks on air freight forwarding service, on the one hand, and tugboat and port agency services and transportation of goods by ship, on the other hand, is likely to cause confusion].

We find that with the evidence of record in this case, the Trademark Examining Attorney has established the requisite, viable commercial relationship between applicant's goods and registrant's services. In order to demonstrate the commercial relationship between applicant's goods and registrant's services, the Examining Attorney relies upon twenty use-based, third-party registrations. Some of these registrations show that retail stores selling gifts also commonly sell figurines and plaques. Moreover, other third-party registrations show that the same companies market gifts, on the one hand, and plaques, on the other hand, whether it be at the retail or wholesale level, through mail order or on-line purchases. Although such registrations are not evidence that the different marks shown therein are actually in use, or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the type of services rendered by registrant would include goods of the kind offered by applicant. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. That such is indeed the case is borne out by an on-line advertisement also made of record by the Examining Attorney about Hallmark Keepsake Ornaments and Collectibles, where the Hallmark company touts its "figurines" as "the perfect gift."

Applicant, throughout its argument, has concluded that "the distinct, noncompetitive and unrelated nature of the goods and services represented"³ herein, constitutes "the critical element minimizing the possibility, let alone probability, of confusion."⁴ However, at no point does applicant try to refute the contrary conclusions that the Trademark Examining Attorney would have us draw from the evidence of record on this critical point.

Our conclusion that confusion is likely is not altered by the alleged absence of any reported incidents of actual confusion during a period of six years of contemporaneous use by the parties of their respective marks.

First, the Trademark Examining Attorney has correctly objected to this tardy assertion in the appeal brief, presented without any affidavit or other evidence to support this statement.

Second, even if this bald assertion had any probative value, the verified absence of any instances of actual confusion is a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents

³ Applicant's appeal brief, p. 4.

⁴ Applicant's appeal brief, p. 3.

thereof would be expected to have occurred and would have come to the attention of one or both of these trademark owners. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). In this case, the record contains no indication of the level of sales or advertising by applicant. Just as significantly, we have not had opportunity to hear from the registrant on this point. Therefore, applicant's claim that no instances of actual confusion have been brought to applicant's attention is not indicative of an absence of a likelihood of confusion.

Decision: The refusal to register is affirmed.

G. D. Hohein

D. E. Bucher

C. M. Bottorff
Administrative Trademark
Judges, Trademark Trial and
Appeal Board